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No. 03-13

IN THE

Supreme Court of the United States

THE REPUBLIC OF AUSTRIA, a foreign state, and the AUSTRIAN GALLERY,

Petitioners,

v.

MARIA V. ALTMANN,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR *AMICUS CURIAE*, SOCIETE NATIONALE DES CHEMINS DE FER FRANCAIS IN SUPPORT OF NEITHER PARTY

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THE INTEREST OF THE *AMICUS CURIAE* [1]

The *Amicus Curiae*, like the petitioner in the instant case, is a foreign sovereign as defined in the Foreign Sovereign Immunities Act of 1976, and is a defendant in a suit brought in respect of acts alleged to have taken place during or shortly after World War II. Both the instant case and the case to which the *Amicus* is a party raise the issue of applicability of the FSIA to events prior to its passage, though in different postures. The *Amicus Curiae* has filed a petition for certiorari to the Court of Appeals for the Second Circuit upon which this Court has not yet acted, *Société Nationale des Chemins de Fer Français v. Abrams et al*, No. 03-284, filed August 22, 2003.[2] Since the decision in the instant case may well have an impact on the outcome of the suit against the *Amicus*, either in this Court (if review is eventually granted) or (if review is denied) in further proceedings in the lower courts, prudence dictates that the position of the *Amicus* be presented to the Court at this time. As explained hereafter, the position of the *Amicus* is not identical to the position of either party in the instant case, and this brief is not submitted in support of either party.

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1. The parties have consented to the filing of this brief. Their letters of consent have been lodged with the Clerk of the Court. This brief has been authored in its entirety by undersigned counsel for the *amicus curiae*. No person or entity, other than the named *amicus* and its counsel, has made any monetary contribution to the preparation and submission of this brief.

2. The case was conferenced on November 7, 2003, but no action was taken.

SUMMARY OF ARGUMENT

1. For purposes of determining whether a jurisdictional statute applies to actions brought after passage of the statute based on events prior to passage, a distinction must be drawn between jurisdiction-conferring and jurisdiction-ousting provisions. Different provisions of the Foreign Sovereign Immunities Act have different effects — some conferring and some denying jurisdiction. Section 1605(a)(3) of the FSIA, the provision at issue in the instant case, for the first time bestows jurisdiction on U.S. courts to hear initial claims against a sovereign arising from an alleged expropriation. Other provisions of the Act operate to preclude jurisdiction against a foreign sovereign or sovereign instrumentality. In particular, § 1603(b) provides that state instrumentalities as defined are entitled to the same immunities as the sovereign, i.e., that there is no jurisdiction unless one of the exceptions to immunity is applicable. As World War II claims against foreign sovereigns and their instrumentalities continue to proliferate, the Court should be careful to focus on the several provisions of the FSIA involved in such cases, and to keep the relevant distinctions in mind.

2. The unprecedented search conducted by the Court of Appeals in the instant case in order to deduce how the State Department would have responded to a request for immunity six decades ago is too speculative to support a determination with respect to jurisdiction and immunity. The Second Circuit has built on the approach of the Ninth Circuit in the *Altmann* case before the court on this petition to launch deeper and even more speculative inquiries that impair the separation of powers and contradict the express intent of the Congress to remove the State Department from case-by-case participation in litigation against foreign sovereigns.

ARGUMENT

I. The Instant Case Presents Different Considerations From The Case Brought Against The *Amicus Curiae*, And In Interpreting The Foreign Sovereign Immunities Act The Court Should Be Careful To Preserve These Critical Distinctions.

A. Any Ruling on Impermissible Retroactivity in This Case Should be Limited to Application of Provisions Conferring Jurisdiction Where No Jurisdiction Existed Before.

This case, like the action brought against the *Amicus Curiae*, raises the question of application of the Foreign Sovereign Immunities Act of 1976 to claims based on events during or shortly after World War II. However, in the instant case, plaintiff relies on the FSIA to confer jurisdiction over a claim that almost certainly could not have been brought in a U.S. court prior to adoption of the Act,[3] and *sovereign defendants* contend that applying the provision to them would be "impermissibly retroactive." In contrast, in the action brought against the *Amicus Curiae*, *Abrams et al v. SNCF*, 175 F. Supp. 2d 423 (E.D.N.Y. 2001), *vacated and remanded*, 332 F.3d 173 (2d Cir. 2003), the FSIA bars plaintiffs' claim and it is the sovereign defendant who relies on the Act while *plaintiffs* urge that applying the Act would be "impermissibly retroactive." In *Abrams*, plaintiffs argue that they could have brought their action prior to adoption of the Act since,

3. We say "almost" certainly because the claim arose in the age of absolute immunity, when suits could not be brought against foreign sovereigns in the United States. However, plaintiffs in *Altmann* contended, and the Ninth Circuit agreed, that Austria could not reasonably have expected the State Department to grant it immunity.

as they contend, a claim of sovereign immunity would not have been allowed. Defendant, *Amicus Curiae* herein, disputes that contention, and the Court of Appeals did not accept it, but remanded the case to the District Court for further inquiry with respect to the pre-1952 U.S. law and practice. The *Amicus Curiae* submits that conferral of jurisdiction by statute, as asserted by plaintiff in the instant case, is fundamentally different for purposes of retroactivity analysis from limiting the jurisdiction of courts by statute, as was clarified by passage of the FSIA with respect to claims over state instrumentalities such as *Amicus* SNCF.

It is the submission of *Amicus Curiae*, supported as hereinafter set out briefly and set out in greater detail in its petition for certiorari in Case 03-284, that a statutory limitation of jurisdiction always operates prospectively and is therefore not caught in the dilemma of "impermissible retroactivity." Conferral of jurisdiction on a court, on the other hand, such as inclusion for the first time of claims against a foreign state based on expropriation, FSIA § 1605(a)(3), has been subject to a retroactivity analysis, to determine: (a) whether Congress intended the new cause of action to be available in respect to events prior to the enactment; and (b) in the absence of clear intent, whether applying the statute to pre-enactment conduct would be impermissibly retroactive in that it would frustrate the legitimate expectations and justified reliance of the sovereign defendants. *See, e.g., Jackson v. People's Republic of China*, 794 F.2d 1490 (11th Cir. 1986), *cert. denied*, 480 U.S. 917 (1987); *Carl Marks & Co., Inc. v. Union of Soviet Socialist Republics*, 841 F.2d 26 (2d Cir. 1988) (both concluding that claims by holders of imperial bonds issued seven decades earlier could not be brought under the FSIA.)

The instant case does not raise the issue of the effect of a jurisdiction-ousting statute directly, since the question presented addresses only the conferral, and not the exclusion of jurisdiction by the FSIA. Thus the Court may well wish to defer the issue of the effect of a statutory bar to jurisdiction to consideration of *Abrams* or some later case. If this is the direction in which the Court wishes to proceed, *Amicus* urges that the Court do so explicitly, lest too general a statement about retroactivity in its judgment in this case blur the distinction here emphasized. Of course, if the Court were to grant review in No. 03-284, *SNCF v. Abrams*, the distinction between conferral and ouster of jurisdiction for purpose of retroactivity analysis could be clearly spelled out by the Court in that case.

B. The Presumption Against Retroactive Application Does Not Apply to Legislation that Forecloses Jurisdiction Over Particular Claims.

In the leading decision on retroactive application of statutes, *Landgraf v. USI Film Products*, 511 U.S. 244 (1994), this Court set forth a general presumption against retroactivity:

> [E]lementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted.

511 U.S. at 265. The majority opinion in *Landgraf* went on to distinguish statutes "conferring or ousting jurisdiction

whether or not jurisdiction lay when the suit was filed." The Court, per Justice Stevens, wrote:

> Application of a new jurisdictional rule usually "takes away no substantive right but simply changes the tribunal that is to hear the case." [citation omitted]. Present law normally governs in such situations because jurisdictional statutes "speak to the power of the court rather than to the rights or obligations of the parties".

Id. at 274.

In his concurrence in *Landgraf*, Justice Scalia, joined by Justices Kennedy and Thomas, further clarified the relationship between jurisdiction and retroactivity, and pointed out the distinction between jurisdiction-conferring and jurisdiction-eliminating effects:

> . . . the purpose of provisions conferring or eliminating jurisdiction is to permit or forbid the exercise of judicial power — so that the relevant event for retroactivity purposes is the moment at which that power is sought to be exercised. Thus, applying a jurisdiction-eliminating statute to undo past judicial action would be applying it retroactively; but applying it to prevent any judicial action after the statute takes effect is applying it prospectively.

Id. at 293.

In *Lindh v. Murphy*, 521 U.S. 320 (1997), Chief Justice Rehnquist, joined by Justices Scalia, Kennedy and Thomas, reiterated the need to distinguish between jurisdiction-conferring and jurisdiction-ousting legislation:

> Although in *Hughes Aircraft Co. v. United States ex rel. Schumer*, we recently rejected a presumption favoring retroactivity for jurisdiction-*creating* statutes, . . . nothing in *Hughes* disparaged our longstanding practice of applying jurisdiction-*ousting* statutes to pending cases.

Id. at 342 n.3 (emphases in original).

The suit brought against *Amicus* in the *Abrams* case was not, of course, in any sense a pending case when the FSIA was adopted. But if a door-closing provision can apply even to an action that had already been filed when the statute was passed, it must surely be applicable to a claim based on events more than three decades before passage of the Act and filed nearly a quarter century after passage of the Act.

II. Speculation About How The State Department Would Have Or Might Have Responded To A Request For Sovereign Immunity Sixty Years Ago Is Inevitably Unreliable. Inquiry Into Hypothetical Decisions That Might Have Been Made Long Ago Should Not Form The Basis Of A Judicial Determination Of Jurisdiction In Presently Pending Actions.

The Court of Appeals in the instant case based its determination concerning the application of the jurisdiction-conferring aspect of the Foreign Sovereign Immunities Act to pre-enactment events on its finding as to how the Department of State would have responded to a request for sovereign immunity by Austria. Focusing its inquiry in large part on a document issued by the State Department in quite different circumstances,[4] the Court of Appeals concluded that the Department would not have "recognized and allowed" a request for immunity on behalf of the Republic of Austria at the time of the events giving rise to the claim. Therefore, the Court held, the Republic could not have reasonably

4. In relying in substantial part on the so-called "Bernstein Letter", the Ninth Circuit failed to distinguish between the Act of State doctrine raised as a defense by a private litigant in the *Bernstein* cases, and the issue of sovereign immunity raised by the sovereign in *Altmann*. No government was involved in the *Bernstein* litigation, and no plea of sovereign immunity was raised in those cases. *See Bernstein v. Van Heyghen Frères*, 163 F.2d 246 (2d Cir. 1947), *cert. denied*, 332 U.S. 772 (1947), (act of state doctrine applied to foreclose a private suit by a former owner of ships seized by the former German government); *Bernstein v. N.V. Nederlandsche-Amerikaansche Stoomvaart-Maatschappij*, 210 F.2d 375 (2d Cir. 1954), (act of state doctrine not applied following State Department's letter urging that the doctrine not be applied to foreclose acts of the now defunct government of Nazi Germany).

expected a request for immunity to be granted, and hence applying the 1976 Act to the events of the 1940s would not be "impermissibly retroactive." This is the first instance since the passage of the Foreign Sovereign Immunities Act where a U.S. court has based its decision on its speculation as to how the Department of State would have responded to a request for immunity on behalf of a sovereign, and the conclusion is inherently unpersuasive.

The Court of Appeals in *Abrams* took its cue from *Altmann*, but carried the process a significant step further. The court remanded the *Abrams* case to the District Court with instructions to "develop a record" as to how the State Department would have responded to a request for immunity on behalf of a French state instrumentality, *Amicus* herein.

In carrying out this direction, the District Court has addressed a letter to the Legal Adviser of the State Department stating:

> I would appreciate, if you think it appropriate, your considered view whether the State Department would have recognized a sovereign immunity claim if this case had been brought in the immediate post-war period.

Letter from District Judge David G. Trager, August 28, 2003.

In two cases heard after *Abrams*, a different panel of the Second Circuit followed the lead of the panel in *Abrams*, remanding claims brought against Poland and Austria to the respective district courts with directions to "invite the participation of the Department of State in developing a record to support their determinations." *Garb v. Republic of*

Poland, 2003 WL21890843 (2d Cir. Aug. 6, 2003), (certiorari applied for); *Whiteman v. Republic of Austria*, WL 31868236 (2d Cir. Aug. 6, 2003), (certiorari applied for). The Court of Appeals in the latter cases cautioned the District Courts that the necessary factual inquiry should be conducted "with appropriate attention to separation-of-powers concerns", but otherwise gave no guidance.

As of this writing, the State Department has not responded to the letter from the District Judge. It is evident, however, that the precedent set in the instant case by the Ninth Circuit has already led to roving inquiries about how the Executive Branch would have acted two generations ago in four cases brought against three sovereign states, with still other cases not far behind. Unless this precedent is checked, it seems inevitable that the State Department will be dragged into case-by-case participation in litigation against foreign sovereigns, contrary to the express desire of the Congress in adopting the FSIA.[5] In the process, the orderly construction of an important statute, based on the text and the intention of the Congress, is bound to suffer.

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5. *See Jurisdiction of United States Courts in Suits Against Foreign States*, Report of the House Comm. on the Judiciary, H.R. Rep. No. 94-1487, p. 7 (1976):

> A principal purpose of this bill is to transfer the determination of sovereign immunity from the executive branch to the judicial branch, thereby reducing the foreign policy implications of immunity determinations and assuring litigants that these often crucial decisions are made on purely legal grounds and under procedures that insure due process.

CONCLUSION

In deciding the issue of retroactivity presented by the instant case, the Court should keep in mind the distinction between jurisdiction-conferring and jurisdiction-foreclosing effects of the FSIA, and should be careful not to preempt the contention of *SNCF* in the *Abrams* case that applying the FSIA to bar suit against it would have no impermissibly retroactive effect. Further, the Court should reject all attempts to run the tape of history backwards, by speculating, or asking the State Department to speculate, how it would have responded to a request for immunity six decades ago.

Respectfully submitted,

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